

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 10, 2022

CLAIM NO. 202200142

JOSHUA ROSS

PETITIONER

VS.           **APPEAL FROM HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE**

BANKS DELIVERIES, INC. and  
HON. STEPHANIE L. KINNEY,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

BEFORE: ALVEY, Chairman, STIVERS and MILLER, Members.

**ALVEY, Chairman.** Joshua Ross (“Ross”) appeals from the August 5, 2022 Opinion, Award, and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits without any enhancing multipliers, and medical benefits for a left foot and ankle injury Ross sustained on June 24, 2021 while working for Banks Deliveries, Inc. (“Banks”). On that date, Ross stepped from

a delivery truck into a pothole, causing his left ankle injury. Ross also appeals from the August 16, 2022 Order denying his Petition for Reconsideration.

On appeal, Ross argues the ALJ erred by failing to award the three-multiplier contained in KRS 342.730(1)(c)1. He argues the ALJ is required to support her decision regarding his physical capacity to return to the work he was performing at the time of the injury based upon the facts, and a fair interpretation of the entirety of the evidence. He argues there is no evidence supporting his ability to return to his pre-injury employment. He argues the ALJ should have relied upon his testimony rather than the medical opinions because neither physician provided an opinion regarding whether he is physically capable of performing his previous job duties on a regular basis. Because we perceive no error by the ALJ, and her decision is supported by substantial evidence, with a contrary result not compelled, we affirm.

Ross filed a Form 101 on February 2, 2022 alleging he sustained a left foot and ankle injury on June 24, 2021 while delivering packages for Banks at Ft. Knox, Kentucky. He claimed he stepped from the delivery truck into a pothole. He alleged he later injured his right ankle when he fell at home due to his left ankle giving way. Ross did not file a Form 104.

Ross testified by deposition on March 14, 2022, and at the hearing held on July 1, 2022. Ross is a high school graduate, and he resides in Bardstown, Kentucky. He was born on January 25, 1985. He has no specialized vocational training except for welding classes he took while in high school. Ross was an artillery crew member in the Kentucky Army National Guard from 2006 to 2012. His employment history includes construction work, cable installation, factory

assembly, and delivering packages for Federal Express through Banks. He testified Banks is a contractor for Federal Express. He currently works as a commercial painter.

Ross worked Monday through Friday, and occasionally on Saturday, delivering packages weighing up to 75 pounds for Banks. He also moved packages weighing up to 400 pounds with a hand truck. He testified he averaged 120 stops per day. His deliveries required him to climb stairs and use ramps. When he arrived to the work-station each day, the truck was already loaded. In addition to the deliveries, he picked up packages for shipping from the work-station. He earned \$200.00 per day. At the hearing, the parties stipulated Ross' average weekly wage ("AWW") at the time of the accident was \$869.92. He had no assistant, or jumper, and he worked alone unless he was training a new hire. He had no previous health problems.

At the time of the accident, Ross was making a residential delivery. He stepped down into a pothole with his left foot. He experienced a left ankle pop, and he fell. He attempted to stand afterward. He then hopped to his truck and sat down. He reported the incident and met another driver who assisted with completing his deliveries.

Ross then went to the emergency room at a hospital in Elizabethtown. He underwent surgery performed by Dr. John Blankenship. He received TTD benefits at the rate of \$586.70 per week, and followed up with Dr. Blankenship. He had physical therapy and wore a walking boot.

Ross subsequently fell down steps at home when his left ankle gave way, and he sustained a right foot/ankle injury requiring surgery. He did not complete treatment for the right ankle because Banks did not pay for it. He never returned to work for Banks. He testified he would have attempted to return to work for Banks if he had not been fired. He was terminated by Banks on November 30, 2021 due to a disagreement over the use of the company credit card. He does not believe he can perform his previous work for Banks. He still uses an ankle brace and has left knee swelling. Ross reported he continues to experience ankle pain, and he occasionally wears a foot brace. He last treated for either ankle in October 2021, and he has no future medical appointments for either condition.

He began working full time for a commercial painting company on January 5, 2022. He testified he had never previously worked as a commercial painter, although this is contradicted by his job application. He works 40 hours per week for the painting company, and he can sit or stand as necessary. The job requires him to lift up to 30 pounds. He testified he plans to continue working for the painting company.

Ross filed Dr. Blankenship's June 29, 2021 office note in support of his Form 101. Dr. Blankenship noted Ross sustained a left ankle inversion injury when he stepped in a pothole while delivering packages for Banks. He noted the left ankle splint was intact, and Ross could wiggle all his toes. He noted Ross was neuro-vascularly intact and had sensation to all five of his foot nerves. Dr. Blankenship diagnosed Ross with a left ankle distal fibula fracture. Ross followed up with Dr.

Blankenship on October 5, 2021. On that date, Ross was also diagnosed with a right fifth metatarsal fracture.

Dr. Jeffrey Fadel evaluated Ross at his attorney's request on February 14, 2022 for a work-related left ankle injury from stepping in a pothole while delivering packages. Ross reported his left ankle is painful with moderate stiffness. He also noted right foot tenderness with only a slight antalgic gait. He diagnosed a left malleolar fracture of the left ankle caused by the June 24, 2021 work accident. He found Ross had reached maximum medical improvement ("MMI"). He also diagnosed a right fifth metatarsal shaft fracture caused from an acute episode of left ankle instability. He assessed a 2% impairment rating for the right ankle and a 5% impairment rating for the left ankle based on the 5<sup>th</sup> Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He stated those impairment ratings combine for a 7% impairment rating. He additionally stated Ross may want to consider having his hardware removed. He recommended Ross refrain from repetitive stair climbing, carrying greater than 70 pounds occasionally for short distances, and walking on uneven ground. Dr. Fadel stated there is no contraindication from Ross returning to his specific job.

In a supplemental report dated May 31, 2022, Dr. Fadel stated he disagreed with Dr. Thomas Loeb, and he reiterated Ross has a 5% impairment rating for the left ankle and 2% for the right ankle pursuant to the AMA Guides. He stated wearing a CAM walker boot does not totally prevent instability or giving way. He again stated the right ankle injury is related to the left ankle injury.

Ross next filed the information from his July 1, 2021 admission to Baptist Health Hardin. Dr. Blankenship diagnosed him with a left fibula/ankle fracture, and status post open reduction and internal fixation (“ORIF”) of the distal fibula fracture with installation of the metallic hardware. He also filed physical therapy records from Baptist Health Bardstown for treatment he received on July 15, 2021 and December 2, 2021.

Ross filed multiple treatment records from Baptist Health Medical Group Orthopaedics for treatments he received on 11 occasions between June 29, 2021 and November 23, 2021 for both his left and right ankle injuries. The last treatment note indicated he was doing well using a CAM walking boot, and his incision site was healing. He had some left ankle swelling, but his range of motion was intact. Ross additionally filed x-rays and photographs for use as exhibits at the hearing. Ross also filed the September 16, 2021 note from Baptist Health physical therapy indicating he had not returned to work. He additionally filed the September 17, 2021 off work slip from Baptist Orthopaedics.

Banks filed Dr. Bart Goldman’s December 24, 2021 records review report. Dr. Goldman had previously performed a utilization review on June 30, 2021 and recommended denial of the left ankle surgery as medically unnecessary. He noted that on November 30, 2021, Ross was 153 days post-surgery with a healed fracture and functional range of motion. He found it was reasonable to place Ross at MMI. He found no indication for Ross to remain off work or to engage in modified duty. He recommended Ross to return to full duty work.

Dr. Loeb evaluated Ross on May 10, 2022 at Banks' request. He noted Ross' history of sustaining a left ankle injury when he stepped into a pothole while working. He diagnosed Ross with a non-displaced left distal fibular fracture with ORIF with a plate. He also diagnosed Ross with a minimally displaced fifth distal third metatarsal fracture with an oblique orientation, with ORIF and two surgical screws. Dr. Loeb found the left ankle injury is work-related, and the right ankle injury is not. He found Ross had reached MMI for both injuries. He found Ross has 0% impairment ratings for both the left and right ankle injuries. He noted Ross is doing well post-rehab, and no additional treatment is necessary. He noted Ross has returned to full duty work with no restrictions. Dr. Loeb also opined Ross is functioning at a normal level, and he requires no restrictions for either of his injuries, and no additional medical treatment is necessary.

Banks filed Dr. Loeb's May 29, 2022 supplemental report. He had reviewed Dr. Fadel's report. He noted that both the left and right ankle fractures had healed by the date of his evaluation. Dr. Fadel evaluated Ross three months earlier, and his condition had greatly improved during the interim period. He found Ross had full range of motion of both ankles and feet. He opined the left foot/ankle injury did not lead to the right foot/ankle injury. He found Ross has normal range of motion.

Banks subsequently filed records from Chambers Painting, including Ross' job application. That application reflects Ross had two years of previous experience as an industrial/commercial painter. He had additionally worked six months before that with another painting contractor.

A Benefit Review Conference was held on June 9, 2022. The parties agreed Ross sustained a left foot and ankle injury on June 24, 2021. Banks paid TTD benefits at the rate of \$586.70 per week from June 25, 2021 to December 4, 2021 in the total amount of \$14,499.87. Banks had paid \$4,902.79 in medical benefits. The parties agreed the contested issues included whether Ross has the physical capacity to return to the type of work performed on the date of the injury, whether Ross sustained a work-related right ankle injury, proper use of the AMA Guides, TTD, Ross' AWW, benefits per KRS 342.730, and medical benefits. The ALJ granted Ross through June 27, 2022 to introduce rebuttal evidence.

The ALJ rendered the Opinion, Award, and Order on August 5, 2022. The ALJ determined Ross sustained a work-related left foot/ankle injury while working for Banks. She also determined his right foot/ankle injury is compensable. The ALJ determined Ross reached MMI on February 14, 2022, and she awarded TTD benefits from the date of injury to that date. Based upon the stipulated AWW of \$869.62, she found the appropriate TTD rate is \$579.75 per week. She found Banks is entitled to credit for any TTD benefits paid, including overpayment as to rate. The ALJ awarded PPD benefits based upon the 7% impairment rating Dr. Fadel assessed. Relying upon Drs. Fadel and Loeb, the ALJ determined Ross could return to his pre-injury work, and therefore declined to enhance the award of PPD benefits by the three-multiplier contained in KRS 342.730(1)(c)1. She also awarded medical benefits pursuant to KRS 342.020.

Both Ross and Banks filed Petitions for Reconsideration. Banks argued the ALJ erred in finding the right foot/ankle injury compensable. It also

argued the ALJ erred by awarding TTD benefits past January 5, 2022, the date Ross began working as a commercial painter. Finally, Banks argued the ALJ erred in finding it responsible for payment of medical bills not submitted within 45 days.

In her Order issued on August 31, 2022, the ALJ sustained Banks' Petition of Reconsideration regarding the termination of TTD benefits, and revised her decision to find Banks is only responsible for the payment of such benefits through January 5, 2022. The ALJ denied Banks' argument regarding compensability for the right foot/ankle injury. The ALJ also noted Banks had contested medical bills for the right foot/ankle injury from the outset. Based upon the holding in R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915 (Ky. 1993), she found the medical bills were timely submitted and compensable.

In his Petition for Reconsideration, Ross argued the ALJ erred by finding he is not entitled to an enhancement of his award of PPD benefits by the three-multiplier contained in KRS 342.730(1)(c)1. He argued that although Dr. Fadel indicated he could return to his pre-injury job, the restrictions Dr. Fadel recommended prevent him from doing so. He argued, as he does on appeal, the ALJ should have ignored the opinions of both Drs. Fadel and Loeb when considering the application of KRS 342.730(1)(c)1. The ALJ denied Ross' Petition for Reconsideration in an Order issued on August 16, 2022, specifically finding as follows:

This ALJ considered Plaintiff's testimony that he could not perform his pre-injury job duties. This ALJ also notes that Plaintiff has obtained employment, beginning in February of 2022, as a painter. This ALJ remains cognizant of Dr. Ronald Fadel's recommended

restrictions. However, this ALJ noted that Dr. Fadel opined:

I see no contraindication for Mr. Ross's ability to return back to his specific job, considering his injuries. (Fadel Report, p. 4).

Despite the recommended restrictions, Dr. Fadel indicated Plaintiff had the capacity to return to his pre-injury work. This ALJ agrees. Additionally, this ALJ finds Plaintiff can perform his pre injury job within the confines of Dr. Fadel's recommended restrictions. Also, this ALJ's finding that Plaintiff retains the capacity to perform his pre-injury work is supported by Dr. Thomas Loeb's opinions. This ALJ considered Plaintiff's testimony but did not find it persuasive considering Drs. Fadel and Loeb's opinions regarding the issue.

Ross appeals from the ALJ's August 5, 2022 Opinion, Award, and Order and the August 16, 2022 Order on Petition for Reconsideration. He argues the ALJ erred by not enhancing his award of PPD benefits by the multiplier contained in KRS 342.730(1)(c)1. As the claimant in a workers' compensation proceeding, Ross had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since he was unsuccessful, Ross must demonstrate the evidence compels a different result. For evidence to be compelling, it must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded the evidence and the inferences to be

drawn therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). An ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Further, as stated in Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986):

If the fact finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whitaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). As long as the ALJ's ruling regarding an issue is supported

by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

We find the ALJ adequately reviewed the evidence presented, including Ross' testimony, along with the opinions provided by Drs. Fadel and Loeb. The ALJ clearly cited in both her decision and in the Order on Petition for Reconsideration the evidence upon which she relied, and the basis of her decision. We find no error. The ALJ could freely rely upon the opinions presented by those physicians in determining Ross is not entitled to the three-multiplier contained in KRS 342.730(1)(c)1. We note Dr. Loeb recommended no restrictions and Dr. Fadel, although recommending some restrictions, opined Ross could return to his pre-injury work. The ALJ was not compelled to rely solely upon Ross' assessments of his physical capacity. The ALJ's decision is supported by substantial evidence and a contrary result is not compelled; therefore, we affirm.

Although an ALJ must effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for a decision, he or she is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of her reasoning in reaching a particular result. Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

We find the ALJ sufficiently outlined the evidence upon which she relied in reaching her determination. The ALJ adequately considered the evidence of record and explained her reasons for determining Ross' award of PPD benefits should not be enhanced by the three-multiplier contained in KRS 342.730(1)(c)1.

This is a finding of fact upon which this Board cannot superimpose its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Miller v. Go Hire Emp. Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015).

Accordingly, the August 5, 2022 Opinion, Award, and Order and the August 16, 2022 Order on Petition for Reconsideration rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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